IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.2258 OF 2006

Mrs.Safiyabanoo Mohammed Arif Rizvi,
aged about 60 years,
Indian Inhabitant, residing at
91/93, Sarang Street, Room No.13,
Haji Faruque Mansion, 5th Floor,
Mumbai - 400 003.

.. Petitioner
(Mother of the detenu)

V/s

1. The Union of India

2. Somnath Pal,
The then Joint Secretary
to the Government of India,
Ministry of Finance,
Department of Revenue,
6th Floor, 'B' Wing,
Janpath Bhavan, New Delhi

3. The Superintendent of Prison,
The Mumbai Central Prison,
Arthur Road, Mumbai

4. The State of Maharashtra .. Respondents

Mr.Maqsood Khan for the Petitioner.
Mr.R.M.Agarwal for Respondent-Union of India.
Mr.D.S.Mhaispurkar, APP for Respondent-State.

CORAM : DR.S.RADHAKRISHNAN, &
SMT.R.S.DALVI, JJ.

DATE OF RESERVING JUDGMENT: 28.08.2007
DATE OF PRONOUNCEMENT OF JUDGMENT: 05.09.2007

JUDGMENT: (PER DR.S.RADHAKRISHNAN,J.)

1. By this petition, the petitioner who is the mother of the detenu is challenging an order of detention dated 24th May, 1999 passed by the Joint Secretary of Government of India under Sec.3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling

Activities Act, 1974, (hereinafter stated as the "said Act" for brevity sake), with a view to prevent the detenu Iqbal in future from acting in any manner prejudicial to the conservation of foreign exchange. The order of detention was passed and the detenu was directed to be kept in the Central Prison, at Mumbai. Alongwith the said order detailed grounds were furnished to the detenu Iqbal.

2. The learned Counsel Mr.Maqsood Khan, appearing on behalf of the detenu challenges the above detention order only on two grounds. Firstly, that the order was not justified from the materials placed before the detaining authority as the material do not disclose the activities to be prejudicial to the conservation of foreign exchange as the exact quantity of foreign currency purchased by the detenu from Riyaz Kashmiri has not been quantified. In view thereof, it was submitted that there is non application of mind. Secondly, the learned Counsel Mr.Maqsood Khan appearing on behalf of the detenu has contended that there is a gross delay in passing the detention order inasmuch as more than 10 months had lapsed from the time of disclosure of the detenu’s name on 15th May, 1998 and also that the said detention order was not executed for over seven and half years, and even at the time of execution on 11th September, 2006 the detaining authority ought to have considered whether the detention was really needed or

not.

3. The brief facts are that the Respondents found that one Riyaz Ahmed Kashmiri and Javed Ahmed Kashmiri were indulging in large scale illegal sale of foreign currency in an organised manner especially to enable passengers illegally carrying the said foreign currency abroad. The modus operendi appears to be that the said Riyaz Ahmend Kashmiri and Javed Ahmed Kashmiri alongwith Iqbal, the detenu herein, used to obtain various passports of different persons for the purpose of securing employment abroad and keep photocopies of the relevant pages and thereafter affixing the seal of M/s Empire Exchange Bureau filling in the amount of foreign exchange, and attaching BTQ application form, the form used to be forged as if it was signed by the persons indicated in the passport. It appears that the detenu also used to sign those BTQ applications i.e.forged applications and deposit the cash amount and obtain pay order in favour of other FFMCs and used to sign cheques for obtaining pay orders, and the foreign exchange so obtained will be sold at a premium to passengers who were going abroad. The aforesaid passengers who were actually carrying the said foreign exchange were totally different from the name under which the foreign exchange was obtained. It appears that the said Riyaz Ahmed Kashmiri and Javed Ahmed Kashmiri had purchased over two lakhs US Dollars in the year 1997 itself and the overall

amount appeared around 41,55,611 US Dollars, and 23,000 Pounds Sterlings were also purchsed in this manner and sold at a premium. The grounds of detention served on the detenu sets out in detail all the aforesaid facts and the exact involvement of the detenu, and ultimately the authority after satisfying itself the necessity to prevent the detenu from indulging in such activity and to conserve foreign exchange, the aforesaid detention order was passed, which is impugned in this Petition.

4. It appears that the though the order was passed in 1999, the same could not be executed till September-2006 as the detenu was absconding and was not traceable at all and fortunately in the month of September-2006 as the detenu was giving evidence in one case before the learned Sessions Judge at Mumbai, one of the accused in the said sessions case indicated that the present detenu was Iqbal Hasan Mohamed Arif Rizvi wanted in the said detention order. In that process the authority came to know that the detenu was the same person, in connection with the said detention order. Accordingly, the detention order was executed on 11.09.2006, in the evening after the evidence of the detenu was recorded on that day.

5. Mr.Maqsood Khan, the learned Counsel appearing on behalf of the detenu has strongly contended that, firstly, the detaining authority did not have sufficient

material to indicate that the detenu was carrying on activities which were prejudicial to the conservation of foreign exchange, and also that the authority concerned could not establish clearly the exact quantity of foreign exchange purchased by the detenu from Riyaz Ahmed Kashmiri, and as such he contended that there was total non-application of mind while passing the said detention order.

6. With regard to the aforesaid contentions, the learned Counsel Shri.Agarwal appearing on behalf of the Respondent, detaining authority, has pointed out in detail, from the grounds, various particulars clearly indicating the involvement of the detenu, inasmuch as he used to forge the BTQ Applications and used to deposit large sums of money and also collect foreign exchange and then handover the same to various passengers going abroad to enable them to carry illegally. Shri.Agarwal has pointed out that this is a large scale foreign exchange racket in an organised manner and the involvement of the detenu was explicit and large sums of money were also involved in the above, and it cannot be very precisely stated as to the exact amount of foreign exchange which was purchased by the detenu, since the actions were based on a number of Hawala transactions.

7. The learned Counsel Shri.Maqsood Khan appearing for the detenu with regard to the second ground has

contended that there has been a delay of about 10 months in actually passing the order of detention, inasmuch as the authority concerned was aware of the name of the detenu when the same was disclosed on 15.05.1998 by Riyaz Kashmiri when his statement was recorded, and as such, the order of detention was passed in a belated manner. Over and above, Mr.Maqsood Khan has contended that even the order of detention passed in September-1999 was executed only in September-2006 that is over a period of seven years delay in execution of the order, and as such, the detaining authority ought to have considered whether at all the detention order ought to have been executed against the detenu at the present juncture. In that behalf, Mr.Maqsood Khan referred to and relied upon the judgment of the Supreme Court in the case of **Union of India V/s.Muneesh Suneja - 2001 AIR SCW 463,** wherein, this very issue of delay in execution of the detention order was considered, and in Paragraph No.8 the Supreme Court has observed as under:-

> "At the same time, it must also be noticed that the order or detention having been made as early as on 9th June, 1998 and the same not having been effected till today, it is certainly necessary for the authorities concerned in the Government to apply mind as to whether detention of the Respondent is still necessary or not and take appropriate steps either in giving effect to the order of detention or to revoke the same. In addition, we may also notice that the order made by us will not prejudice the interest of the Respondent that in the event the said order of detention is given effect to, it is open to the Respondent to raise all grounds as are permissible in

law, not withstanding what we may have observed in the course of this order."

8. Mr.Khan also referred to another judgment of the Supreme Court in the case of **Bhawarlal Ganeshmalji V/s.State of Tamilnadu & Another - (1979) 1 SCC 465,** wherein, in paragraph No.6 the Supreme Court has dealt with the issue of delay in execution of the detention order. The relevant paragraph No.6 reads as under:-

"It is true that the purpose of detention under the COFEPOSA, is not punitive but preventive. The purpose is to prevent organised smuggling and activities and to conserve and augment foreign exchange. It is true that the maximum period for which a person may be detained under the COFEPOSA is one year. It is further true that there must be a 'live and proximate link' between the grounds of detention alleged by the detaining authority and the avowed purpose of detention viz. the prevention of smuggling activities. We may in appropriate cases assume that the link is 'snapped' if there is a long and unexplained delay between the date or the order of detention and the arrest of the detenu. In such a case, we may strike down an order of detention unless the grounds indicate a fresh application of mind of the detaining authority to the new situation and the changed circumstances. But where the delay is not only adequately explained but is found to be the result of the recalcitrant or refractory conduct of the detenu in evading arrest, there is warrant to consider the 'link' not snapped but strengthened. That precisely is the state of affairs before us. The order of detention was made on December 19, 1974. The detenu was found to be absconding. Action was taken pursuant to Section 7 of the COFEPOSA and he was proclaimed as a person absconding under section 82 of the Criminal Procedure Code. The proclaimation was published in several leading English and local language daily newspapers. His photograph was exhibited in cinema halls. A reward of Rs.5000/- was also announced for his apprehension. Despite of all this effort he could not be arrested until he surrendered on February 1, 1978. We do not have any hesitation in overruling the submission of Shri.Jethmalani based on the delay in the execution of the order of detention."

9. Mr.Khan thereafter referred to another judgment of the Supreme Court in the case of **Union of India & Ors. V/s.Arvind Shergill and Another - 2000 AIR SCW 3258**, wherein, in paragraph Nos.5 & 6 the Supreme Court has dealt with the issue of delay in execution of the detention order. The relevant Paragraph Nos.5 & 6 of the aforesaid judgment of the Supreme Court, read as under:-

> "5. However, the learned Counsel for the Respondent submitted that the order of detention was made on 17.11.1998, whereas the writ petition was filed on 21.4.1999 and order of stay was passed on the same date and subsequently that order continued till the disposal of the matter on 4.8.1999. Thus, he submitted that the facts upon which detention had been ordered and the actual detention not being effected till today, the nexus thereto has snapped and in the lignt of the decision of this Court in Sunil Fulchand Shah V/s.Union of India, (2000) 3 SCC 409; (2000 AIR SCW 582: AIR 2000 SC 1023: 2000 Cri.L.J.1444), it would not be appropriate for this Court to direct detention of the husband of the Respondent Now. A bench of Five Judges of this Court examined this matter and majority of Judges held that a detenu need not be sent back to undergo the remaining period of detention after a long lapse of time when even the maximum prescribed period intended in the order of detention has expired, unless there is still a proximate nexus between the period of detention prescribed when the detenu was required to be detained and the date when the detenu is required to be detained pursuant to the appellate order and the State is able to satisfy the Court about the desirability of further or continued detention. It was also made clear therein that where a long time has not lapsed or the period of detention initially fixed in the order of detention has also not expired, the detenu may be sent back to undergo the balance period of detention."
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> "6. Therefore, in the present case, what we have to

look is whether any long period has lapsed as it has happened in Sunil Fulchand Shah's case (2000 AIR SCW 582: AIR 2000 SC 1023: 2000 Cri.LJ 1444) (supra) wherein the petitioner was directed to be detained for a period of one year with effect from 4.7.1986 and the said period of one year expired on 3.7.1987 and the matter was taken upon for hearing only on 16.2.2000. In the circumstance, when the period of detention itself had expired 13 years earlier, then this Court came to the conclusion as aforesaid. However, this is not the position in the present case at all. Husband of the respondent evaded arrest as is obvious and obtained an interim order from the High Court wihch was in force till the disposal of the writ petition and therafter on quashing of the detenion order qustion of detention made did not arise now. Therefore, we do not think that it would be appropriate to state that merely by passage of time the nexus between the object for which the husband of the respondent is sought to be detained and the circumstances in which he was ordered to be detained has snapped. However, we make it clear that if those circumstances did not exist, then it would be appropriate for the Government to revoke the order of detention and, if still certain circumstances as apprehended in the order of detention exist, it will be open to the Government to enforce the same. Making this position clear, we allow this appeal and set aside the order made by the High Court. Appeal allowed."

10. In the light of the above, Mr.Khan, the learned Counsel for the detenu very strongly contended that the detention of the detenu Iqbal cannot be sustained as there was total non-application of mind as well as gross delay in execution of detention order and the authority had not considered whether it is really necessary to execute detention order in the year 2006.

11. Mr.Agarwal, appearing on behalf of the detaining authority strongly contended that this is a large scale foreign exchange racket in an organised manner and that the detaining authority was fully justified in passing

the aforesaid detention order. He took us through the grounds of detention and the reasons given therein as well as various material and the statements made by the Riyaz Ahmed as well as Javed Ahmed Mistry clearly indicating the involvement of the detenu, and he also pointed out that these activities have been carried on right from the year 1997 and after collecting all the details and even after the statement of 15.05.1998 various other particulars had to be collected and ultimately the order of detention came to be passed in March, 1999. Mr.Agarwal pointed out that, from all the aforesaid material it cannot be said that the detaining authority had no material before him to come to the said conclusion.

12. With regard to the delay in execution of the order of detention Mr.Agarwal strongly relied upon the judgment of the Supreme Court in the case of **Bhawarlal Ganeshmalji V/s.State of Tamilnadu,** which is quoted hereinabove, wherein the Supreme Court has very categorically held that only when the live link is snapped, that is to say when there is a long unexplained delay between the date of the order of detention and the arrest of the detenu, only in such cases the order of detention should be struck down. However, when the delay is not only adequately explained and the said delay was found to be as a result of recalcitrant and refractory conduct of the detenu in evading arrest, then

the live link not only does not snap but gets strengthened by this aforesaid conduct of evading arrest.

13. Mr.Agarwal thereafter referred to another judgment of the Supreme Court in the case of **Subhash Muljimal Gandhi V/s.L.Himingliana and Another - 1994 (6) SCC 14,** wherein, the Supreme Court while dealing with the issue of delay in executing the detention order, in paragraph No.13 of the order, has observed as under:-

> "Mr.Jethmalani lastly submitted that having regard to the fact that the order of detention was passed as far back as in 1990 and the maximum period of detenion, which the appellant would have to undergo under the order was two years was long over, his detention at this distant point of time would be punitive and not preventive. It is undoubtedly true that an unusual delay in execution of an order of detention if not satisfactorily explained, may pursuade the Court to draw such an inference. There is, however, no scope for drawing such an inference in this case as the delay here has been occasioned not by any omission or commission on the part of the detaining authority. On the contrary, it is the appellant who has delayed the execution by first moving the Bombay High Court and then this Court. That apart, the Respodnents have asserted that though this Court had not passed any interim order against execution of the order, it could not be served as the appellant was absconding. It is pertinent to point out here that an identical contention raised by Mr.Jethmalani on similar facts, was negatived by this Court in Bhawarlal Ganeshmalji V/s.State of Tamilnadu."

. Therein also the Supreme Court has clearly held that as the appellant was absconding the order could not be executed, and therefore the detaining authorities cannot

be faulted with regard to the same.

14. Mr.Agarwal, the learned Counsel for the detaining authority also referred to and relied upon the another judgment of our High Court in the case of **Mukesh T.Bora V/s.Union of India - 2006 Criminal Law Journal 243,** wherein, this Court has also clearly taken a view that once the proclamation is made under Section 7(1)(b) of the said Act the Detenue ought to have appeared before the authority on his own accord. However as the detenu who is avoiding in view of his absconding the Detenue cannot be allowed to reap benefit out of his own wrong.

15. Mr.Agarwal also referred and relied upon the another judgment of our Court in the case of **Kasim Kadar Kunhi V/s.State of Maharashtra & Ors.- 2005 ALL MR (Cri) 1468,** wherein this Court emphasised that once the order is passed u/s.7(1) (b) of the said Act, the burden will lie upon the detenu to establish that it was not possible for him to comply with the direction issued under the said provisions of law for his appearance. It is very clearly held in the said judgment that there being a presumption about the knowledge to the detenu of the detention order in view of direction under sec.7(1)(b) having been published in official gazette it was necessary for the detenu himself to discolse the reason for not being possible for him to appear before the authority and his whereabouts, and having failed to

do so the detenu cannot take benefit from his own wrong.

16. Under the aforesaid facts and circumstances, Mr.Agarwal, the learned Counsel for the detaining authority has contended that in the instant case it is the very act of detenu absconding for over seven years and inspite of best efforts made by the authority they could not trace him and only on 11.9.2006 they were accidently able to notice, when it was brought to their notice by an accused person in that case that he was the very same person. Mr.Agarwal also brought to our notice that the detenu while deposing as a witness evidence given in Spl.Case No.7/2004 before the Sessions Court Bombay, especially the evidence given by him on 4th, 5th & 11th September, 2006 clearly indicates that the detenu used to receive large sums of money and convert the same in foreign exchange illegally. With the consent of both the parties we perused the said evidence. The detenu has categorically admitted that the Indian citizens working in Dubai used to handover money to Rashidbhai in Dirhams and after receiving instructions from Rashidbhai, he used to pay money in rupees to various persons in Mumbai. Detenue has even given the telephone numbers of the said Rashidbhai and as to how he used to tell him the names to whom the money was to be given. In the evidence he has also explained in detail, as to how he used to collect money and convert the same into foreign exchange illegally and give the same to persons

who were in need of the same. Mr.Agarwal therefore contended that the above evidence also indicates that right from 1997 till 2004 the detenu was continuously indulging in a large scale foreign exchange racket, and as such, the order of the detaining authority was fully justifiable, and that the live link had not snapped. The delay in execution of the detention order was entirely due to detenu absconding and avoiding arrest.

17. Mr.D.S.Mhaispurkar, the learned Counsel appearing on behalf of the authority who executed the detention order, has pointed out that the detention order was issued against the detenu on 24.05.1999, which was received by the concerned cell on 8th June 1999, and on the very same day the concerned officers had visited the premises of the detenu mentioned in the detention order. However, on enquiries it was found that he was staying in the said premises on a rental basis and that he had left the said premises. Thereafter on enquiries it was found that he was staying at three different places and at all the three different places the detenu could not be found. The necessary information to trace the detenu was given to the Sr.Inspector of Police, Dongari Police Station, under Lookout Cell. The affidavit of Mr.Dilip Sakharam Kale, Police Inspector, who is attached to Crime Branch (Prevention), dated 11.07.2007 categorically states that the authority made various attempts specially 9th June-1999, 7th July-1999, 9th

July-1999, 17th August-1999, 20th April-2000 and 21st December-2005 to arrest the detenu, however, the detenu was not traceable and hence could not be arrested. Finally a notification contemplated under Section 7(1)(b) of the said Act was issued on 20th July, 1999 and the same was gazetted and the same was also pasted on the premises of the detenu, as per the address known to the detaining authority, being Flat No.5, Kapadia Complex, Sarang Street, Mumbai. Mr.Dilip Sakharam Kale, in the aforesaid affidavit also discloses that the detenu has attended the special Court constituted under MCOC Act in Special Case No.7/2004 and while he was giving evidence on 11th September, 2006 it was revealed that he was absconding and avoiding execution of the detention order. Thereafter at the end of the day on 11th September, 2006 in the evening the detenu was apprehended, that is to say that the detention order was executed. Hence, the learned Counsel Mr.Mhaispurkar has contended that all necessary steps were taken and as the detenu was avoiding arrest, the same could not be executed. Over and above, he emphasised that under Section 7(1)(b) of the COFEPOSA Act it was the duty on the detenu to surrender after the said order and appear before the authority and he cannot take advantage of his own wrong and contend that that there was delay in execution of the said order.

18. After hearing all the parties, and after perusal of

all the records including the evidence given by the detenu in the Sessions Court, Bombay in September-2006, we enquired from the Advocate Mr.Maqsood Khan as to whether he wants the matter to be remanded to the Detaining Authority to consider the material as disclosed in September-2006 by the detenu and to decide as to whether the detention order should continue or not. Mr.Maqsood Khan, the learned Counsel for the detenue categorically stated that there was no need to send the matter back to Detaining Authority, as the detention would come to an end on 10.9.2007 and that we can take into account the evidence of the detenu given in September-2006 while deciding the matter.

19. After having heard all the learned Counsel at length and after considering all the material, with regard to the first ground of attack by Mr.Maqsood Khan that there was no material before the detaining authority to pass the aforesaid order of detention, it is amply clear from the record that the detailed grounds have been set out and the material produced has clearly indicated the explicit involvement of the detenu in the aforementioned foreign exchange racket, and though the exact quantity of foreign exchane purchased by the detenu was not indicated, sufficient details have been furnished to indicate the clear involvement of the detenu in the aforesaid detention order, specially in the grounds, and the evidence of detenu recorded in

September-2006. The aforesaid records clearly indicate the involvement of the detenu in an organised foreign exchange racket from 1997 till 2004. The propensity of detenu continuing to indulge in such activities is also established. Under these circumstances, we do not find any merit in the aforesaid contention that there is non application of mind on the part of the detaining authority in passing the order of detention, The details of the basis for detention have been properly considered. We do not find any substance in the above contention of non application of mind while passing the detention order.

20. With regard to the second ground of attack, that is there is a gross delay in execution of the detention order, it is explicitly clear from the aforesaid Supreme Court Judgments and our High Court Judgments that if the detenu himself tries to take advantage and is absconding, the detenu will not be permitted to do so. Over and above, as rightly pointed out under Sec.7(1)(b) of the said Act, the detenu ought to have presented himself once that notification was issued and published in a Gazette, whereas the detenu, very cleverly avoided and absconded, and now cannot turn round and say that there is a gross delay in execution of the detention order. In fact in the aforesaid **Bhawarlal's case** the Supreme Court has clearly held that in such a case of absconding detenu, the live link is not snapped, and in

fact in fact gets strengthened by such an act of absconding.

21. Under the aforesaid facts and circumstances, we do not find any substance with regard to both the aforesaid grounds, as there is no merit in the same. Hence, Rule stands discharged.

(SMT.R.S.DALVI, J.) **(DR.S.RADHAKRISHNAN,J.)**